

# TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [REDACTED] 1918

No. [REDACTED] 417

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D. G. McKINLEY AND J. L. BRAY, PLAINTIFFS IN ERROR,

v.s.

THE UNITED STATES OF AMERICA.

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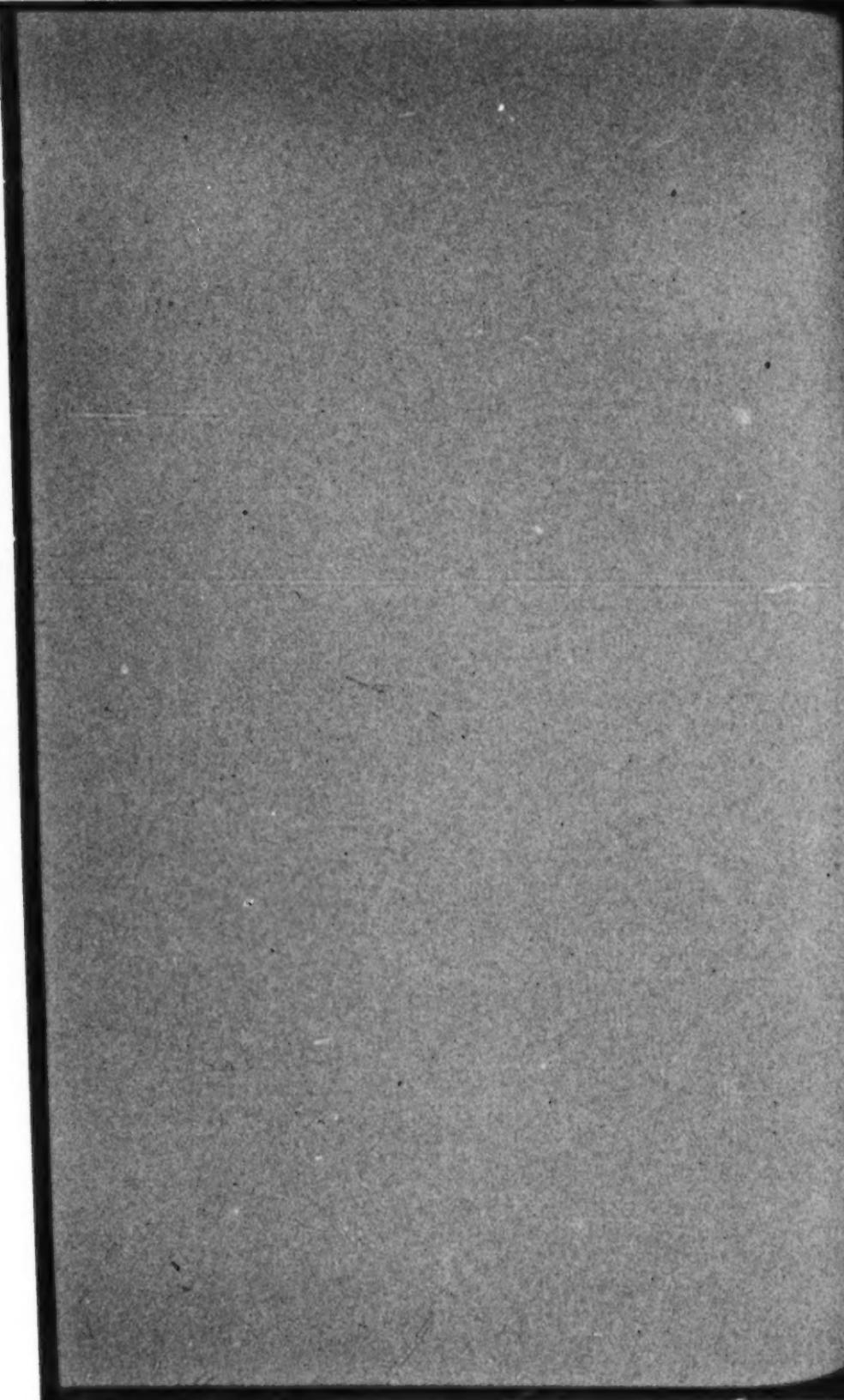
IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF GEORGIA.

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FILED APRIL 18, 1918.

(26,449)



(26,449)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 982.

D. G. MCKINLEY AND J. L. BRAY, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF GEORGIA.

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*Indictment.*

The Grand Jurors of the United States, selected, chosen and sworn in and for the Western Division of the Southern District of Georgia, upon their oaths present:

That heretofore, to-wit, on the first day of December, in the year of our Lord one thousand nine hundred seventeen, one D. G. McKinley and one J. L. Bray, whose respective further given names are to the Grand Jurors aforesaid unknown, late of said Division and District, in the County of Bibb, within said Division and District and within the jurisdiction of this court, did then and there unlawfully, wilfully, and corruptly keep and set up a house of ill fame, brothel and bawdy house, within the distance as prohibited by the Secretary of War, as authorized by and under Section Thirteen of "An Act to Authorize the President to Increase Temporarily the Military Establishment of the United States," approved May 18th, 1917, to-wit, within five miles of a certain military station of the United States, to-wit, a Provost Guard of the Military Forces of the United States, stationed in what is known as the "Old Nisbet School," on Orange Street, in the City of Macon, Bibb County, Georgia, which house of ill fame, brothel and bawdy house is located on Mulberry Street, in the City of Macon, Bibb County, Georgia, and is known as Hotel McKinley, and is advertised by a sign in front of the main or street entrance thereof as Soldiers' Home; contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the said United States.

F. O. MILLER.

*Foreman of the Grand Jury.*

E. M. DONALSON,  
*United States Attorney.*

Filed March 8th, 1918. Cecil Morgan, Deputy Clerk.

*Plea.*

The defendants D. G. McKinley and J. L. Bray waives arraignment and pleads not guilty in open Court, this 12th day of March, 1918.

FEAGIN &amp; HANCOCK,

*Atty's. for D. G. McKinley and J. L. Bray.*

Filed March 12, 1918. Cecil Morgan, Deputy Clerk.

*Verdict.*

We, the jury, find the defendants Guilty this 15th day of March, 1918.

L. A. HEATH, *Foreman.*

Filed March 15, 1918. Cecil Morgan, Deputy Clerk.

*Sentences.*

The above named defendants having been found guilty by a jury on the fifteenth day of March, 1918,

It is Considered, Ordered, and Adjudged by the Court that the defendant J. L. Bray be imprisoned in the common jail of Bibb County for a period of two (2) months, beginning with date of his incarceration after conviction, and that he do pay a fine of one hundred dollars, (\$100.00), to include costs of prosecution; and that said defendant, D. G. McKinley, be imprisoned in the common jail of Bibb County for a period of one year, beginning from the date of his incarceration after conviction, and that he do pay a fine of one thousand dollars (\$1000.00) to include costs of prosecution; and that said defendants both remain in prison in said jail until said respective fines are paid, or until they are otherwise discharged by law.

In Open Court,

This 25th day of March, 1918.

EMORY SPEER,

*United States Judge.*

Filed March 25, 1918. Cecil Morgan, Deputy Clerk.

*Bill of Exceptions.*

Be It Remembered, That on the trial of this cause in this Court, at the October Term, 1917, of said Court, the Honorable Emory Speer, Judge, presiding, when the following proceedings were had to-wit:

The defendants D. G. McKinley and J. L. Bray were indicted in the District Court of the United States for the Southern District of Georgia for a violation of the Act of Congress approved May 18, 1917, Section 13, which indictment came on to be heard on the 12th day of March, 1918. The defendants filed their plea of not guilty. A jury was empanelled to try said case, and after all the evidence was in the jury rendered a verdict finding the defendants D. G. McKinley and J. L. Bray guilty, which verdict was rendered on the 15th day of March, 1918; that the judge withheld his sentence until the 25th day of March, 1918, at which time the Court sentenced D. G. McKinley to serve twelve months in the jail of Bibb County, Georgia, and in addition thereto to pay a fine of one thousand dollars. He sentenced the said J. L. Bray to serve two months in the jail of Bibb County, Georgia, and in addition thereto to pay a fine of one hundred dollars. After which judgment and sentence of the Court each of the defendants made a motion in arrest of judgment; which motion in arrest of judgment was made on the ground that the bill of indictment, all of the evidence, the verdict of the jury and the judgment of the Court was invalid, null and void, for that, neither of the defendants had violated any valid subsisting

law of the United States of America, for that the act on which the said defendants D. G. McKinley and J. L. Bray were convicted, being the Act approved May 18, 1917, was unconstitutional for that the United States Congress did not have the constitutional authority and power to pass said law. The motion was overruled by the Court, which ruling of the Court was excepted to and exceptions noted and allowed.

And, now, in furtherance of justice, and that right may be done the defendants, D. G. McKinley and J. L. Bray, tender and present this, the foregoing, as their bill of exceptions in said case to the action of the Court, and pray that the same may be settled and allowed, and signed and sealed by the Court, *and signed and sealed by the Court*, and made a part of the record, and this is accordingly done, this 27th day of March, 1918.

EMORY SPEER, *Judge.*

Filed March 27, 1918. Cecil Morgan, Deputy Clerk.

4 In the District Court of the United States for the Western Division of the Southern District of Georgia.

At Law.

D. G. MCKINLEY and J. L. BRAY, Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

*Petition for Writ of Error.*

Now comes D. G. McKinley and J. L. Bray, petitioners herein and say:

That on the 25th day of March, 1918, the District Court entered a judgment herein in favor of the United States of America against these defendants in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of these plaintiffs, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, these defendants pray that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings and papers on this cause, duly authenticated, may be sent to the Supreme Court of the United States.

FEAGIN & HANCOCK,  
*Attorneys for Plaintiff in Error.*

R. DOUGLAS FEAGIN,  
OLIVER C. HANCOCK,  
*Of Counsel.*

Filed March 27, 1918. Cecil Morgan, Deputy Clerk.

5 In the District Court of the United States for the Western Division of the Southern District of Georgia.

At Law.

D. G. Mc KINLEY and J. L. BRAY, Plaintiffs in Error,  
vs.

UNITED STATES OF AMERICA, Defendant in Error.

*Order Allowing Writ of Error.*

This 27th day of March, 1918, come the defendants D. G. Mc Kinley and J. L. Bray by their attorneys and files herein and presents to the Court their petition praying for the allowance of a writ of error, and an assignment of errors intended to be urged by them, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and such other and further proceedings may be had as are proper in the premises.

On consideration whereof the court does allow the writ of error upon the defendants giving bond according to law to be approved by the Court or its order in the sum of Four thousand (\$4,000.00) Dollars as to D. G. Mc Kinley and the sum of One thousand (\$1,000.00) Dollars as to J. L. Bray, the same to be approved by the Court or its order, which shall operate as supersedeas bonds.

EMORY SPEER, Judge.

Filed March 27, 1918. Cecil Morgan, Deputy Clerk.

THE UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Judge of the District Court for the Western Division of the Southern District of Georgia, Greeting:

Because in the record and proceedings, and also the rendition of a judgment of a plea which is filed in said District Court, before you, between D. G. Mc Kinley and J. L. Bray, Defendants, and the United States of America, *defendant*, a manifest error has happened, to the great damage of the said D. G. Mc Kinley and J. L. Bray, as by his complaint appears. We, being willing that the error, if any has been, should be duly corrected, and fully and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United

States, together with this writ, so that you may have the same at the City of Washington on the 27th day of April, next, in said Supreme Court, to be then and there held, that the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 27th day of March, in the year of our Lord one thousand, nine hundred and eighteen, and of the independence of the United States of America the one hundred and forty second.

[SEAL.]

LENOIR M. ERWIN,

*Clerk of the District Court of the United States  
for the Southern District of Georgia.*

By CECIL MORGAN,

*Deputy Clerk.*

Filed March 27, 1918. Cecil Morgan, Deputy Clerk.

7

*Citation.*

THE UNITED STATES OF AMERICA, ss:

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the City of Washington, on the 25th day of April, next, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the Western Division of the Southern District of Georgia, wherein D. G. McKinley and J. L. Bray are plaintiffs in error and you are defendant in error, to show cause, if any there by, why the judgment rendered against the said plaintiffs in error should not be corrected, and speedy justice be done to the parties in that behalf.

Given under my hand at the City of Macon, in the district above named, this 27th day of March, in the year of our Lord one thousand nine hundred and eighteen.

EMORY SPEER,

*Judge of the District Court of the United States  
for the Western Division of the Southern  
District of Georgia.*

Due and legal service above citation acknowledged—Copy received and all other service waived.

WALLACE MILLER,

*Asst. U. S. Atty.*

March 27th, 1918.

Filed March 27, 1918. Cecil Morgan, Deputy Clerk.

*Assignment of Errors.*

The *plaintiff* in this action, in connection with this petition for writ of error, makes the following assignment or errors, which they avers exist:

First. The Court erred, in overruling defendants' motion in arrest of judgment.

Wherefore, defendants pray that said judgment be reversed.

FEAGIN & HANCOCK,

*Attorneys for Defendants.*

R. DOUGLAS FEAGIN,

OLIVER C. HANCOCK,

*Of Counsel.*

*Praeipe on Appeal.*

In the District Court of the United States for the Western Division of the Southern District of Georgia.

The Clerk in making out the transcript for the writ of error to the Supreme Court of the United States in the above entitled cause will please include the following parts of the record:

1. The indictment with all the entries thereon, including the plea of the defendants of not guilty and the verdict of the jury.
2. The sentence and judgment of the Court based upon said verdict.
3. The bill of exceptions with all the entries thereon.
4. The petition for writ of error with all entries thereon.
5. The order allowing the writ of error.
6. The writ of error.
7. The citation with all entries thereon including the acknowledgement of service of the Government's attorneys.
8. The assignment of errors.
9. The praeipe for the record with all entries.
10. The cost bond filed by defendants.

R. DOUGLAS FEAGIN &

OLIVER C. HANCOCK,

*Attorneys for Plaintiffs in Error.*

*D. G. McKinley and J. L. Bray.*

P. O. Address, Macon, Ga.

Due and legal service of the foregoing praeipe is hereby acknowledged and copy received. All other service waived.

This March 28, 1918.

E. M. DONALSON,

*U. S. Attorney.*

Filed March 27, 1918. Cecil Morgan, Deputy Clerk.

*Cost Bond.*

Know All Men by These Presents, That we, D. G. McKinley and J. L. Bray, as principals, and J. R. McKinley, as *sureties*, are held

and firmly bound unto the United States of America, in the full and just sum of \$250.00, (\$250.00), to be paid to the said United States of America; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 27th day of March, in the year of our Lord one thousand nine hundred and eighteen.

Whereas, lately at a district court of the United States in a suit pending in said Court, between the United States of America, plaintiff, and D. G. McKinley and J. L. Bray, defendants, a judgment was rendered against the said D. G. McKinley and J. L. Bray, and the said D. G. McKinley and J. L. Bray having obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgment in the aforesaid matter, and a citation directed to the said United States of America, citing and admonishinh them to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington, on the 25th day of April, next.

Now, The condition of the above onligation is such, that if the said D. G. McKinley and the said J. L. Bray shall prosecute said writ of error to effect, and answer all damages and costs if *he* fail to make *his* plea good, then the above obligation to be void; else to remain in full force and virtue.

D. G. McKINLEY. [SEAL.]

J. L. BRAY. [SEAL.]

J. R. McKINLEY. [SEAL.]

Sealed and delivered in the presence of

L. M. ERWIN, Clerk.

Approved.

— — —

Filed March 27, 1918. Cecil Morgan, Deputy Clerk.

UNITED STATES OF AMERICA,  
*Southern District of Georgia:*

I, Lenoir M. Erwin, Clerk of the District Court of the United States for the Southern District of Georgia, do hereby certify that the foregoing pages of type writing contain a true copy of the record, bill of exceptions, assignment of error and all proceedings mentioned in the Praeipe, in the cause lately pending in said Court, numbered twenty two, on the Appeal Docket of said Court, entitled D. G. McKinley and J. L. Bray versus The United States of America, as the same now appears of record in my office.

To certify which, witness my hand and seal of said Court, at Macon, in said District, this 3rd day of April, A. D. 1918.

[Seal U. S. District Court, So. Dist. of Georgia, West'n Div.]

LENOIR M. ERWIN,  
*Clerk U. S. District Court,*  
*Southern District of Ga.,*  
By CECIL MORGAN, *Deputy.*

12 THE UNITED STATES OF AMERICA, *ss.*:

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the City of Washington, on the 25th day of April, next, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the Western Division of the Southern District of Georgia, wherein D. G. McKinley and J. L. Bray are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the Judgment rendered against the said plaintiffs in error mentioned should not be corrected, and speedy justice be done to the parties in that behalf.

Given under my hand at the city of Macon, in the district above named, this 27th day of March, in the year of our Lord one thousand nine hundred and eighteen.

EMORY SPEER,  
*Judge of the District Court of the United States  
for the Western Division of the Southern  
District of Georgia.*

Due and legal service above citation acknowledged. Copy received and all other service waived.

WALLACE MILLER,  
*Asst. U. S. Atty.*

Mar. 27th-18.

Entd. minutes. Book K, Folio 467.

13 [Endorsed:] U. S. District Court, Western Division, So. Dist. of Ga. #22. D. G. McKinley & J. L. Bray vs. The United States of America. Citation. Filed March 27, 1918, Cecil Morgan, Deputy Clerk.

Endorsed on cover: File No. 26449. S. Georgia D. C. U. S. Term No. 982. D. G. McKinley and J. L. Bray, plaintiffs in error, vs. The United States of America. Filed April 18th, 1918. File No. 26449.

# In the Supreme Court of the United States.

OCTOBER TERM, 1918.

D. G. McKINLEY AND J. L. BRAY, PLAINTIFFS IN ERROR,  
v.  
THE UNITED STATES OF AMERICA.

} No. 417.

*IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF GEORGIA.*

## MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General and moves the court to advance the above-entitled cause for hearing on a day convenient to the court.

The case involves the validity of the conviction of plaintiffs in error of the offense of unlawfully keeping and setting up a bawdy house within 5 miles of a certain military station in the United States, to wit, "a provost guard of the military forces of the United States," in the city of Macon, Ga., in violation of section 13 of the Selective Draft Act of May 18, 1917, 40 Stat. 76, 83. That section authorizes and directs the Secretary of War to do everything by him deemed to be necessary during the period of the war to suppress and prevent the keeping or setting up of bawdy houses within such distance as he may

deem needful of "any military camp, station, fort, post, cantonment, training, or mobilization place," and imposes a fine of not more than \$1,000 or imprisonment for not more than 12 months, or both, for a violation of any order, rule, or regulation issued by the Secretary to carry out the object and purpose of the statute.

Acting pursuant to this authority the Secretary of War designated 5 miles from any of the military establishments enumerated as the distance within which it should be unlawful to conduct the places denounced by the statute.

Plaintiffs in error, who are at large on bail, challenged the constitutionality of the statute and have sued out a writ of error from this court.

Notice of this motion has been served upon opposing counsel.

ALEX. C. KING,  
*Solicitor General.*

DECEMBER, 1918.



JAMES D. MAHER,  
CLERK

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# In the Supreme Court of the United States

OCTOBER TERM, 1918.

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No. 417

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D. G. MCKINLEY AND J. L. BRAY,  
Plaintiffs in Error,

Vs.

THE UNITED STATES OF AMERICA.

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In Error to the District Court of the United States for the  
Southern District of Georgia.

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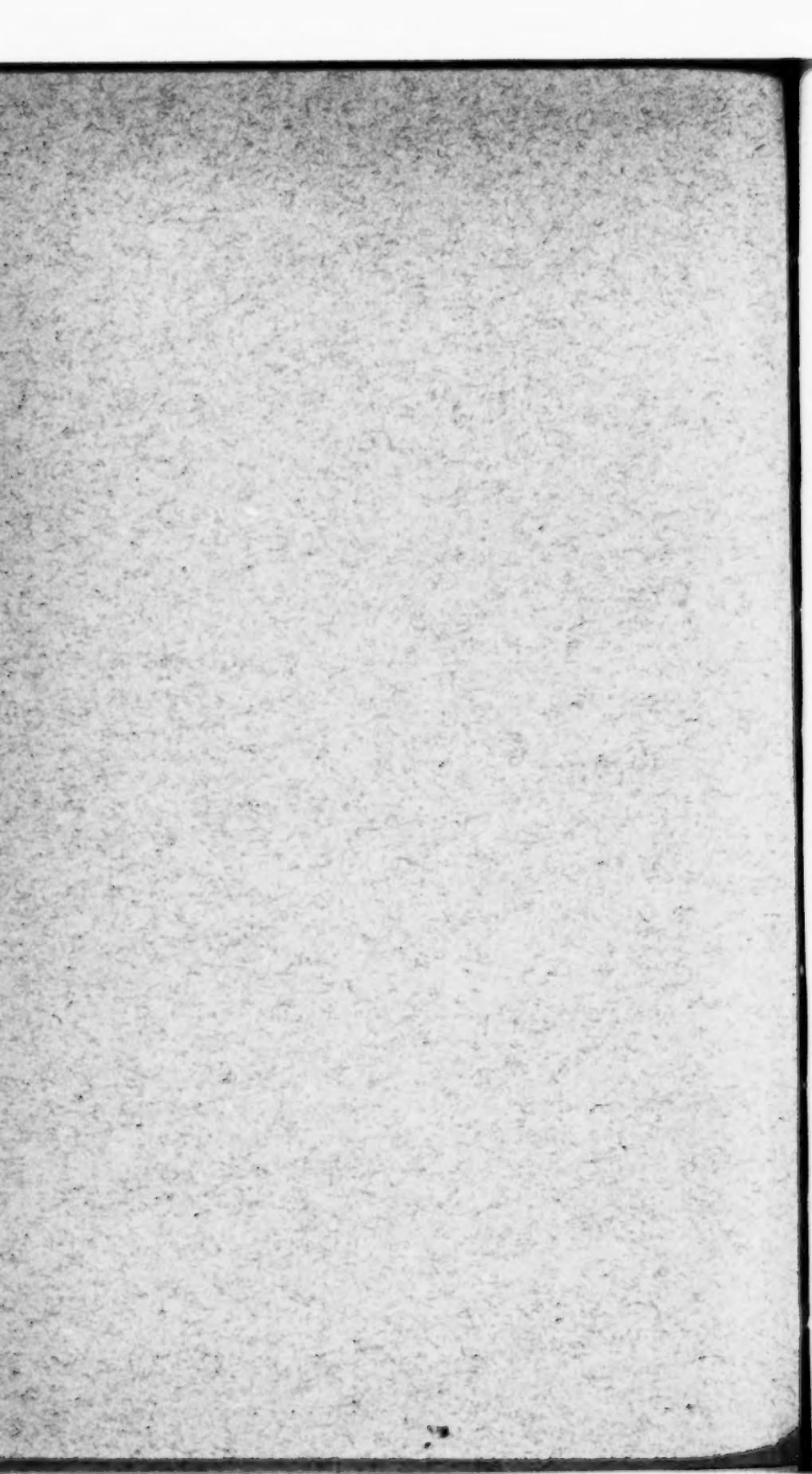
## BRIEF FOR PLAINTIFFS IN ERROR

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R. DOUGLAS FEAGIN,  
OLIVER C. HANCOCK,  
Attorneys for Plaintiffs in Error.

P. O., Macon, Ga.

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SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1918.

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**No. 417**

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D. G. MCKINLEY AND J. L. BRAY,  
Plaintiffs in Error,

Vs.

THE UNITED STATES OF AMERICA.

---

In Error to the District Court of the United States for the  
Southern District of Georgia.

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BRIEF FOR PLAINTIFFS IN ERROR

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STATEMENT OF THE CASE.

The defendants were convicted on an indictment charging them as follows: "That heretofore, to-wit, on the first day of December, in the year of our Lord one thousand nine hundred and seventeen, one D. G. McKinley and one J. L. Bray, whose respective further given names are to the Grand Jurors aforesaid unknown, late of said Division and District, in the County of Bibb, within said Division and District, and within the jurisdiction of this court, did then and there unlawfully, wilfully and corruptly keep and set up a house of ill

fame, brothel and bawdy house, within the distance as prohibited by the Secretary of War, as authorized by and under section thirteen of 'An Act to Authorize the President to Increase Temporarily the Military Establishment of the United States,' approved May 18th, 1917, to-wit, within five miles of a certain military station of the United States, to-wit, a Provost Guard of the Military Forces of the United States, stationed in what is known as the 'Old Nisbet School,' on Orange Street, in the City of Macon, Bibb County, Georgia, which house of ill fame, brothel and bawdy house is located on Mulberry Street, in the City of Macon, Bibb County, Georgia, and is known as Hotel McKinley, and is advertised by a sign in front of the main or street entrance thereof as Soldiers' Home; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said United States."

The defendants were convicted on March 12th, 1918.

The Act of Congress under which the indictment was drawn is the Act of May 18th, 1917, c. 15 par. 13, 40 Stat. 83, and is as follows:

"The Secretary of War is hereby authorized, empowered and directed during the present war to do everything by him deemed necessary to suppress and prevent the keeping or setting up of houses of ill fame, brothels or bawdy houses, within such distance as he may deem needful of any military camp, station, fort, post, cantonment, training or mobilization place and any person, corporation, partnership, or association receiving or permitting to be received for immoral purposes any person into any place, structure or building used for the purpose of lewdness, assignation, or prostitution within such distance of said places as may be designated, or shall permit any such person to remain for immoral purposes in any such place, structure, or building as aforesaid, or who shall violate any order, rule, or regulation issued to carry out

the object and purpose of this section, shall, unless otherwise punishable under the Articles of War, be deemed guilty of a misdemeanor and be punished by a fine of not more than \$1,000 or imprisonment for not more than twelve months, or both."

The Court sentenced the defendants and after judgment and sentence was pronounced the defendants moved in arrest of the judgment, attacking the indictment, verdict and judgment as invalid, null and void, for that neither of the defendants had violated any valid subsisting law of the United States, for that the Act on which the defendants were convicted, being the Act above quoted, under which the defendants were indicted, was unconstitutional for that the United States Congress did not have the constitutional authority and power to pass said law.

The motion in arrest of judgment was overruled by the Court, which ruling of the Court was excepted to and exceptions noted and allowed, and the plaintiffs in error thereupon brought the case by writ of error to the Supreme Court of the United States.

#### SPECIFICATION OF THE ERRORS RELIED UPON

The error relied upon in this case is simply that the lower Court erred in overruling the motion in arrest of judgment of the defendants.

The point was made in the motion in arrest (see pages 2 and 3 of the Record) that the indictment, the verdict of the jury and the judgment of the Court were invalid, null and void, for that neither of the defendants had violated any valid subsisting law of the United States, for that the Act on which the defendants were convicted was unconstitutional for that the United States Congress did not have the constitutional authority and power to pass said law.

The Court below committed error in refusing to sustain this motion in arrest of judgment on the part of the defendants, timely made, and in overruling it.

## BRIEF AND ARGUMENT

The single question involved in this case is that of the constitutionality of the Act of Congress under which the defendants were indicted and convicted. Has Congress the power under the Constitution to punish the offense charged in the indictment or is jurisdiction thereover solely with the State of Georgia?

As we interpret the decisions of the Supreme Court, the question is not an open one, but has been decided in favor of the contention of the plaintiffs in error, on principle, in the case of Keller vs. United States, 213 U. S., 138; 53 Law Ed., pages 737-742.

Speaking for the majority opinion of the Court in the Keller case, Mr. Justice Brewer said: "While the keeping of a house of ill fame is offensive to the moral sense, yet that fact must not close the eye to the question whether the power to punish therefor is delegated to Congress or is reserved to the State. Jurisdiction over such an offense comes within the accepted definition of the police power. Speaking generally, that power is reserved to the States, for there is in the Constitution no grant thereof to Congress."

In the same opinion Mr. Justice Brewer quotes the language of Mr. Justice Story in Houston vs. Moore, 5 Wheat. 1, 48, 5 Law Ed. 19, 30, as follows: "Nor ought any power to be sought, much less to be adjudged, in favor of the United States, unless it be clearly within the reach of its constitutional charter. Sitting here, we are not at liberty to add one jot of power to the National Government beyond what the people have granted by the Constitution."

Nor can the fact that the Act under which the defendants were convicted was emergency legislation, passed during time of war, change or affect the question.

For, as Mr. Justice Davis declared in the opinion of the Supreme Court in *ex parte Milligan*, 4 Wallace, 2-142, 18 Law Ed., page 295:

"The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority."

If these provisions cannot be suspended in time of war, neither can they be added to.

The broad powers of Congress to regulate commerce with foreign nations were not interpreted by the Supreme Court in the Keller case, *supra*, as giving Congress power to make criminal the mere keeping, maintaining, supporting, or harboring, for the purpose of prostitution, any alien woman within three years after she should have entered the United States. The power was expressly denied.

By analogy, and with equally strong reason to support it, the power of Congress "to raise and support armies (but no appropriation of money to that use shall be for a longer term than two years)" cannot be interpreted as giving Congress the power to invade the region of the police power of the States and make criminal, and punishable in the Federal Courts, the keeping of a bawdy house, an offense which is

made criminal and punishable by the laws of every State in the Union. We quote the law of Georgia on the subject, Park's Code of Georgia, Vol. 6, Section 382, as follows:

"382. Lewd House. If any person shall maintain and keep a lewd house, or place for the practice of fornication or adultery, either by himself or others, he shall be guilty of a misdemeanor."

The punishment. Park's Code of Georgia, Vol. 6, Section 1065, as follows:

"1065. Misdemeanors, how punished. Except where otherwise provided, every crime declared to be a misdemeanor is punishable by a fine not to exceed one thousand dollars, imprisonment not to exceed six months, to work in the chaingang on the public roads, or on such other public works as the county or State authorities may employ the chaingang, not to exceed twelve months, any one or more of these punishments in the discretion of the judge . . ."

For if the powers of Congress could be interpreted as extending to this offense, which affects the health, morals, peace and welfare of the entire community, as well as the soldiers who may be within five miles of the place of the commission of the offense, could not, by the same logic, the powers of Congress be extended to cover and include, in time of war, the right to prohibit and punish every offense which affects the peace, morals, health and welfare of the people, and thus destroy and eliminate for the duration of war the police power of the States?

To concede the power in this case is to admit the right of its extension to all other crimes and misdemeanors punishable under the police power of the States.

To give such a construction to the powers of Congress would extend its power to legislate about everything essential to the public safety, health and morals of the people.

It was never intended by the framers of the Constitution

of the United States that Congress should have any such power.

Cooley's Constitutional Limitations, 7th edition, page 831, declares: "In the American constitutional system, the power to establish the ordinary regulations of police has been left with the individual States, and it cannot be taken from them, either wholly or in part, and exercised under legislation of Congress. Neither can the national government, through any of its departments or officers, assume any supervision of the police regulations of the States. All that the Federal authority can do is to see that the States do not, under cover of this power, invade the sphere of national sovereignty, obstruct or impede the exercise of any authority which the Constitution has confided to the nation, or deprive any citizen of rights guaranteed by the Federal Constitution."

For these reasons we respectfully submit that the motion in arrest of judgment should have been sustained by the Court below.

Respectfully submitted,

Attorneys for D. G. McKinley and J. L. Bray,  
Plaintiffs in Error.

P. O., Macon, Ga.

Due and legal service acknowledged on foregoing brief for plaintiffs in error. Copy of same received. All other, further and better service waived.

This \_\_\_\_\_ day of February, 1919.

-----  
U. S. District Attorney, Southern District of Georgia,  
Attorney for Defendant in Error.